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ARTICLE

About the Methods of Studying Private Law: An Italian Perspective

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Abstract

Taking as a starting point the book by Grundmann, Micklitz and Renner, *New Private Law Theory*, the author briefly examines the methods practised today in the most important legal systems for studying private law. There is no unanimous consensus on the definition of "private law", nor on its functions. The formalistic method prevails, using terms, concepts, dogmas stratified over time, with an apparently technical content. In reality, as the three authors demonstrate, and as has been preached in Italy for more than half a century, law is a social science and its function can only be fully understood by combining the formalistic method with economic, sociological and political analysis and considering its historical development.

Keywords: Private Law; theory; methods; legal reasoning; jurisprudence; social sciences

A. The Multidisciplinary Method in Italy

It is always exciting to discover a new methodological approach to study, understand and apply a discipline that one has been used to for many years; and even if the approach is not new, but is presented with new formulas, it is always useful to reflect on the acquisitions already made and the opinions that have been consolidated. The comprehensive volume by Stefan Grundmann, Hans-W. Micklitz and Moritz Renner, *New Private Law Theory*,[1] certainly opens up new horizons for jurists, but above all it invites discussion on the topics dealt with and the results achieved by the authors.

It goes without saying that the book—written by three authoritative German scholars—could not disregard their cultural background or their experiences; and it does reflect the study and teaching of European Union law and European private law that the authors can boast, with the many merits that have rightly been acknowledged to them. This book has much broader ambitions, because its aim is to identify a new path in the analysis of private law inspired by a pluralistic, multidisciplinary approach, in which private law is confronted with sociology, economic analysis, communication theory, comparative law, the historical perspective, the political dimension and the processes of constitutionalization of subjective rights as those protecting the individual—now any person in its comprehensive meaning, with his or her dignity—and fundamental freedoms.

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[1]Stefan Grundmann, Hans-W. Micklitz & Moritz Renner, New Private Law Theory: A Pluralist Approach (2021).

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The development of private law in Continental Europe is a complex process that has affected many branches of national law, and is the byproduct of the dissemination of fundamental rights and of a phenomenon called Europeanisation of law, which has involved twenty seven—and until Brexit, twenty eight—European countries, and the other countries that have followed this process from outside, such as Norway. The European Private Law is the origin of many new concepts, new principles, new rules that have reshaped the national aspect of Member States' private law. The interconnection between economics and law is just one of these factors of development due to the creation of the European Union. But in Italy the abandonment of the formalistic method that was dominant in the Universities—and is still dominant in the Courts—began long before the "Europeanisation" of private law, through a real re-founding carried out by the doctrine, which is the thought of jurists considered as a whole, started in the 1960s.

Italian jurists have contributed to the Europeanisation of private law, both in collaborating in the various initiatives to harmonize and unify the law by drafting principles of contract law and principles of civil liability, as well as by drafting a sort of European civil code—Draft Common Frame of Reference.[2]

Apart from the processes of constitionalization and Europeanization of private law, which have brought together the German and Italian experiences in very close periods—the German one being slightly earlier, dating back to the mid-1950s, and the Italian one to the mid-1960s, anticipating by almost half a century the achievements of French legal culture—and the transformation brought about by the integration of EU law into national legal systems, the other fronts identify as many methods of analysis that have been practiced in Italy for more than sixty years: For sociology, one need only think, obviously without any claim to completeness, of the studies of Niccolò Lipari;[3] for legal policy of Pietro Rescigno[4] and Stefano Rodotà;[5] for economics of Pietro Trimarchi;[6] Francesco Galgano[7] for language of Natalino Irti;[8] for comparative law of Gino Gorla[9] and Rodolfo Sacco;[10] for the theory of pre-comprehension the researches of Cesare Massimo Bianca;[11] and then of all their pupils and the current generation.[12]

In Italy, however, a much more complex phenomenon has occurred, whereby legal philosophers such as Giovanni Tarello[13] and Mario Losano,[14] draw attention to the political aspects of legislators' choice and the task of interpreters; legal historians such as Paolo Grossi,[15] Mario Caravale[16] and Antonio Padoa Schioppa,[17] draw attention to the rooting of methods of interpretation across the centuries; and sociologists such as Alberto Martinelli[18] draw attention to markets' influence on the shaping of private orderings. These authors have dedicated themselves to the analysis of private law, establishing a dialogue with private law scholars that has obliged these

[2]Guido Alpa, Diritto Privato Europeo (2016).

[3]Lipari Nicolò, Il diritto civile tra sociologia e dogmatica: Riflessioni sul metodo (1968).

[4]Pietro Rescigno, Per una rilettura del codice civile, *in* Codici: Storia e geografia di un'idea 34 (Fausto Caggia ed., 2013); Pietro Rescigno, Rilettura del codice civile (per i cinquant'anni della codificaizone) 1 (1993).

[5]Stefano Rodotà, Il problema della responsabilità civile (1964).

[6]Pietro Trimarchi, Rischio e responsabilità oggettiva (1961).

[7]Francesco Galgano, L'imprenditore (1970).

[8]Natalino Irti, *Rilevanza giuridica* 1 Jus 1 (1967).

[9]Gino Gorla, I problemi fondamentali del contratto (1955).

[10]Rodolfo Sacco, Il concetto di interpretazione del diritto (1957).

[11]C. Massimo Bianca, Realtà sociale ed effettività della norma: Scritti giuridici (2002).

[12]Guido Alpa, Diritto civile: Due secoli di storia (2018).

[13]Giovanni Tarello, Teorie e Ideologie del Diritto Sindacale (1972).

[14]Mario G. Losano, Sistema e Struttura del Diritto (2002).

[15]Grossi Paolo, Scienza Giuridica Italiana (2000).

[16]Mario Caravale, Ordinamenti giuridici dell'Europa medievale (1994).

[17]Padoa Schioppa, Storia del Diritto in Europa (2007).

[18]Alessandro Cavalli & Alberto Martinelli, La società europea (2015).

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ones, whether they like it or not, to equip themselves culturally and conceptually to be able to sustain the dialogue.

The culture of private law has therefore been affected by internal forces, aimed at breaking down the shields of dogmatics that imprisoned law in abstract formulas, and external forces, coming from the other sciences, which have challenged the formalist method.

In other words, private law in Italy—which until the 1960s was limited to the civil code and its exegesis, and to the dogmatic framework deriving from the application of current Roman law, and to the application of positive law—has opened up to other disciplines and has been enriched over time, obliging jurists to weave and reweave its theoretical substratum without ever losing touch with reality. In fact, the study of the sources of law includes case law, now considered by most to be an autonomous source with respect to legislation, acts of private autonomy, such as codes of ethics, and practices, particularly in drafting international contracts, which involve the use of typologies, boilerplate templates, and clauses created—mostly in the US—to run business.

Without neglecting the great advantages of formalism, other methods have been added that have enabled private law scholars to better understand social phenomena such as the family, associations and foundations, or institutes traditionally included within the confines of private law, such as property, contract, and civil liability.

Giovanni Tarello[19] has the great merit of having introduced the theories of American legal realism into Italian legal culture, while Silvana Castignone has dealt with Scandinavian legal realism. Tarello demonstrates how the interpretation of law is never a neutral procedure, but conceals political and social intentions, often disguised by dogmatic trappings or apparently aseptic reasoning. It is the class of jurists, which has been refined over the centuries, who, through the monopoly of interpretation, carried out by "technicians" such as lawyers and judges, create the law, starting from the text of the law. Historical analysis explains how these processes of law production developed, through codifications and the consolidation of case law guidelines. Therefore, the process of technicalization and de-politicization of jurists, including judges, is only apparent. Therefore, the

> object of legal science is not the 'norms,' in any sense of this word, but the doctrines and the manipulative activities of jurists. Tarello, in short, accredits the idea that to know the law is not to know the legislative documents, but to know their use by the legal operators.[20]

For his part, Mario Losano, translator of Jhering and Kelsen, has cultivated in his works not only the techniques of interpretation but also historical and comparative profiles, illustrating the circulation of legal models. Over the last few decades, legal historians have begun to broaden their enquiries, which were largely confined to medieval law, to include the centuries closest to our own, studying codification and the doctrinal and jurisprudential foundations of legal institutions. Private law has thus revealed all its hidden aspects, including anthropological ones, linked to family formation, the role of individuals, property, and economic initiative.[21]

Whether all this should be understood as "private law theory" is difficult to say: Either the Italian jurists practiced this theory without knowing it, just as Molière's Monsieur Jourdain spoke prose without knowing it, [22] or it is necessary, before entering into the analysis of the method applied in the book under review, to better define its aims.

For this reason I should better like to entitle the book: "Private Law in a Multidisciplinary Perspective," taking the most relevant profile of the research highlighted in the presentation, just

[19]*See* GIOVANNI TARELLO, L'INTERPRETAZIONE DELLA LEGGE (1980); GIOVANNI TARELLO, DIRITTO, ENUNCIATI, USI: STUDI DI TEORIA E METATEORIA DEL DIRITTO (1974); GIOVANNI TARELLO, IL REALISMO GIURIDICO AMERICANO (1962); GIOVANNI TARELLO, STORIA DELLA CULTURA GIURIDICA MODERNA. I. ASSOLUTISMO E CODIFICAZIONE DEL DIRITTO (1976).

[20]RICCARDO GUASTINI, SAGGI SCETTICI SULL'INTERPRETAZIONE 8 (2017).

[21]Franco Cordero, *Diritto*, in ENCICLOPEDIA EINAUDI (2012); STEFANO RODOTÀ, IL TERRIBILE DIRITTO (2012); PIETRO BARCELLONA, DIRITTO PRIVATO E PROCESSO ECONOMICO (1973).

[22]MOLIÈRE, LE BOURGEOIS GENTILHOMME (1670).

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to underline that private law cannot be relegated within the arid formulas of the exegesis of the provisions of the law and not even within the architectural framework created by the dogmatics—originally the Pandectists—but must be examined in its reality, as a body of rules belonging to the living law, and for this reason affected by the ethical, social, economic and political values that mark the times of law, "le temps du droit," according the expression of François Ost (Paris, 1999).

In other words, the formula "private law theory" risks being equivocal in the eyes of an Italian jurist. In reality, it seems to me that in their work the authors have wished to indicate a multiplicity of methods, all of which are suited to private law, and none of which can claim exclusivity in its interpretation and organization.

In doing so, we must not hide the fact that we must discount the presence of certain problems, which are the fundamental problems of the comparison of legal systems: Language, and legal concepts, first of all, because the use of the English language, which has become the *lingua franca* even in legal studies, offers many difficulties in the transmission of thought that has been formed on categories very distant from those of common law systems, just think of the declinations of the meanings of property and contract. The evolution of methodological approaches is often linked to their land of origin—that is, to a particular legal system which is not easily exportable: One example among all, *Legal Realism* which, in its North American and Scandinavian versions, originates from non-codified systems based on case law, i.e., law created by judges.

It is therefore necessary to be aware of the fact that in the use of categories and terms, pure and simple translation is not sufficient to fully restore the meaning and function of these instruments of language and communication. With respect to the Italian situation, there is certainly a greater affinity with the French, Spanish and German legal culture than with the English or North American common law legal culture. The formula "Private Law Theory" is not used—at least in Italy—and it seems to be more attractive in the Anglophone world.

This is why it is necessary to define better and progressively what we mean by private law, and what the formula "private law theory" may mean; only then can we question the novelties brought by the Authors in this field.

B. Meanings of "Private Law"

It is precisely here that we encounter the first difficulties, because the meaning of private law is not unambiguous. As is well known, the contrast, or, if you like, the comparison, between the families of legal systems runs along the dualism of common law-civil law; "private law" is a less frequent conventional expression in English or North American legal culture, which stands alongside, and in contrast to, "public law."

However, there is now a tendency to highlight the new aspects, which are described as follows in the presentation of a compendium written in the form of a handbook by a large number of British and American scholars:

> This field embraces the traditional common law subjects (property, contracts, and torts), as well as adjacent, more statutory areas, such as intellectual property and commercial law. It also includes important areas that have been neglected in the United States but are beginning to make a comeback. These include unjust enrichment, restitution, equity, and remedies more generally. 'Private law' can also mean private law as a whole, which invites consideration of issues such as the public-private distinction, the similarities and differences between the various areas of private law, and the institutional framework supporting private law - including courts, arbitrators, and even custom.[23]

[23]The Oxford Handbook of the New Private Law (Andrew S. Gold, John C P Goldberg, Henry E. Smith, Emily Sherwin & Daniel B. Kelly eds., 2020).

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Now from what has already been said—and which takes up obvious arguments—there is nothing new in this way of conceiving private law, at least in the eyes of the Italian jurist: Within the boundaries of civil law there are not only contracts, property or civil liability, but the whole law of obligations, which is sometimes studied in its entirety even in common law, at least in the English common law, as shown for example by the works of Ibbetson,[24] and Cook and Oughton[25] there are remedies, now called in this way also in Italy[26] and there are institutes similar to trusts, such as trusteeship [27] or the *fiducie* recently introduced in the French legal system. The other institutes, such as copyright, are part of *commercial law*, which in Italian law shares with civil law the large sections of private law.

But there is no discussion in the Oxford Handbook—and it seems to me not very often in the volume under review—of special contracts, concluded between private individuals—C2C—or between companies and private individuals—B2C—or between companies—B2B and B2b—, which constitute, today as in the past, the heart of property law, and which animate scholars of civil law, both Italian and French, with regard to the discipline of contract types, the analogical application of the rules laid down for individual contracts to other contracts whose rules are lacking, nor are there the discussions that animate Italian doctrine on asymmetrical contracts or, with regard to commercial companies, the protection of stakeholders' interests, without distorting the notion of company to the point of configuring it as "common good."

The reality is that these general categories must be examined through a historical perspective and described in the context in which they operate: On this aspect, it is very useful what the Authors written about the inner relationship between law and history with a comparative method.

This explains why, in my view, one cannot theorize a general discipline of private law without referring to the system under consideration and the historical periods of reference. It is enough to compare the works of scholars of different cultures and different legal experiences to realize that when it comes to private law there is no universal definition to refer to.[28]

The presentation of his book, Weinrib says that he rejects the functionalism popular among legal scholars and advances the idea that private law is an autonomous and non-instrumental moral practice, with its own structure and rationality. He sets out a formalist approach to private law that repudiates the identification of law with politics or economics. He argues that private law is to be understood as a juridical enterprise in which coherent public reason elaborates the norms implicit in the parties' interaction. In his conception, Private law embodies a special morality that links the doer and the sufferer of injury. The standpoint internal to this morality is that law should be studied and applied in itself, and conceived per se, far from any contamination with economics and politics. But this is the concept of law, and of Private law, against which I fight.

Comparison and history are outside the boundaries of private law only in the partitioning of university teaching, and thus purely for the sake of didactic organization, but they flow into it as it were naturally when institutes are examined: For example, one cannot speak of freedom of contract without linking this expression to the incipient capitalism of the second half of the nineteenth century, or of liability based on fault without recalling the forms of protection of entrepreneurs with respect to the satisfactory demands of consumers in order to promote economic development which would have been hindered if the victims had been awarded compensation.[29]

The similarities, differences, anticipations and delays that can be recorded in different legal systems are the salt of comparative law research, but also the backbone of private law *tout court*: How can we understand the relationship between property and industry without comparing legal

[24]David Ibbetson, A Historical Introduction to the Law of Obligations (1999).

[25]John Cooke & David W. Oughton, The Common Law of Obligations (2000).

[26]Adolfo Di Majo, La responsabilità contrattuale.Modelli e rimedi (2002).

[27]Lupoi Maurizio, Istituzioni del diritto dei trust negli ordinamenti di origine e in Italia (2019).

[28]*Compare* Ernest J. Weinrib, The Idea of Private Law (2012) *with* Guido Alpa, What is Private Law? (2010).

[29]*Law: History and Comparison. New purposes for an Ancient Binomial*, *in* 7 Global Perspectives on Legal History 595 (Massimo Brutti & Alessandro Somma eds., 2018).

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models?[30] And how can we understand the insistence of German dogmatics on the *Rechtsgeschäft,* literally translated into Italian—*negozio giuridico*—and Spanish—*negocio juridico*—, but untranslatable into French or English?[31] Finally, how can we understand nineteenth century French and Italian doctrine on the *location d'oeuvres*, if not as an expedient to avoid giving substance to the concrete contents of the employment relationship, which highlighted the unequal bargaining power of the contracting parties?

The reality is that the boundaries of private law, moreover, the very notion of private law, is uncertain if it is not contextualized.

In an icastic way, Philippe Malinvaud observed that the notion of private law—*droit privé*—is very ambiguous and the distinction between private law and public law only functional and jurisdictional.[32]

The periodization of the distinction is important, because the boundaries between the one and the other matter change as economic and social needs change, as shown by the need to keep the state out of the economic relations of private law in the construction of the free market in the nineteenth century, how the perspective changes when the politics of totalitarian states absorb a large part of the private sphere of individuals, as happened in Italy and in Germany during the Thirties, and when the welfare state is built, which becomes more and more extensive until it becomes the *Etat-providence*.[33]

These aspects are mostly ignored in the contributions of British and North American scholars, either by those who talk about "private law theory" or by those who treat the main institutes of private law, even though the experience of Beveridge's Welfare State on the one hand and of the Roosevelt's New Deal on the other appear to be of extraordinary interest for the effect they had on the organization of forms of production, on correcting market dynamics, on creating alongside fundamental freedoms the area of social rights.[34]

The functions assigned to the players involved in creating the rules also vary. Here the field is divided between legislators, judges and private individuals. On the Continent in the nineteenth century, judges were reserved a minority role as mere "executors:" Thibaut had won his duel with Savigny. But at the end of the nineteenth century "sapiential law" took over, and with it another method of interpretation, the "jurisprudence of interests."

In a few words, I doubt that it is possible, nowadays, to build a "general theory of private law" as a pure technical toolbox without any historical contextualization and without any analysis of the political roots of every provision. Therefore, I praise the ideas of the Authors but I would push it even further.

In the totalitarian experiences—which escape the jurists of common law, who are luckier than we were not to have lived through them and not to keep the tragic memory of them—the role of the judge has had alternating fortunes. Under Fascism the legislator had time to construct an entire legal system, corporativist law, and therefore did not want to assign any creative power to the judge. Even the general clauses, which constitute the hinge between the text of the law and the facts of concrete life, allowing a gradual adaptation of the system to new needs, were applied occasionally and very sparingly. On the contrary, under the Nazis, as there was no time to construct a new legal system by means of legislation, a "parallel state" was

[30]Stefano Rodotà, Il terribile diritto. Studies on Private Property and the Commons (2013).

[31]Francesco Galgano, Il negozio giuridico (1988).

[32]Philippe Malinvaud, Introduction à l'étude du droit 209 (2017); *but see Droit privé, droit public*, *in* Dictionnaire de la culture juridique 500 (Denis Alland & Stéphane Rials eds., 2003); Bernardo Sordi, Diritto pubblico e diritto privato.Una genealogia storica (2020); Guido Alpa, Dal diritto pubblico al diritto privato (2017).

[33]Alessandro Somma, *I giuristi e l'Asse culturale Roma-Berlino: Economia e Politica nel diritto Fascista e Nazionalsocialista*, 195 Studien zur europäischen Rechts-geschichte (2005).

[34]Noel Whiteside, *The Beveridge Report and Its Implementation: A Revolutionary Project?*, 24 Histoire@Politique (2014); Silvana Sciarra, Solidarity and Conflict (2019).

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constructed by means of administrative acts and the application of general principles and general clauses.[35]

But even in the *magna divisio* between the law governing the relations of private individuals and public law, which governs the relations between the state and the citizen, one must not oversimplify, as demonstrated by the massive interventions of the state to implement public services that would have been too costly for private individuals, or the anticipatory conceptions of totalitarian laws that considered the family as a public law institution.

Today, the distinction is wavering, not only on the Continent, but also in common law countries. One wonders whether it is worth preserving this "big divide."[36] And in Italy the concept of "regulatory private law" is now appreciated,[37] in which the market sees private individuals as protagonists, with the State playing the role of arbiter of conflicts and mediator of the interests at stake. This solution would deprive private law of any redistributive function aimed at achieving forms of social justice.

C. Meanings of "Private Law Theory"

It is more complex to illustrate to Italian jurists the methodological direction that goes by the name of "private law theory."

According to the fashion of recent years, the use of "theory of . . ." by common lawyers alludes to one or more conceptions of an institute, such as contract or tort, or a field, such as contract law or tort law. It is a critical review that takes into account the interests at stake, the techniques by which they are weighed and balanced, and the ends to be pursued; and thus the "theory" is not formulated merely with analytical intentions, but is rather aimed at achieving political ends. For example, it is a "normative theory" which concerns the best ways of distributing harm in society.[38] Similarly, "contract law theory." Contract could be conceived as a private "affair" without any interference of the State, or a combination of interests in which fundamental rights should be protected, or a means of risk distribution etc.

Investopedia states that:

> [C]ontract theory is the study of how people and organisations construct and develop legal agreements. It analyzes how parties with conflicting interests build formal and informal contracts, even tenancy. Contract theory draws upon principles of financial and economic behaviour as different parties have different incentives to perform or not perform particular actions.[39]

And Markovits uses this term in the plural, to indicate the different conceptions of the contract that have developed in recent decades.[40]

[35] Ernst Fraenkel, The Dual State: A Contribution to the Theory of Dictatorship (E.A Shils, Edith Lowenstein & Klaus Knorr trans., 1993 *reprinted* in 2010).

[36] Guido Alpa, Diritto Privato Europeo (2018); Guido Alpa, Dal Diritto Pubblico al Diritto Pravto (2017); Berardo Sordi, Diritto Pubblico e Diritto Privato: Una Genealogia Storica (2020); The Public Law/Private Law Divide: Une Entente Assez Cardiale? (Studies of the Oxford Institute of European and Comparative Law), (Mark R Freedland, Jean-Bernard Auby eds., 2006); Hans Micklitz, Constitutionalization of Private Law (2014).

[37] *See* Zoppini, Il diritto privato e i suoi confini (2020).

[38] Jules Coleman, Scott Hershovitz & Gabriel Mendlow, *Theories of the Common Law of Torts*, *in* The Stanford Encyclopedia of Phil. (2015); Benjamin C. Zipursky & John C.P. Goldberg, *Thoroughly Modern Tort Theory*, 134 Harv. L. Rev. 184 (2021); The Cambridge Companion to the Philosophy of Law (John Tasioulas ed., 2020); John Gardner, *Tort Law & Its Theory*, *in* Oxford Legal Research Paper Series (2018).

[39] Daniel Liberto, Contract Theory (2019).

[40] Daniel Markovits & Emad Atiq, *Philosophy of Contract Law*, The Stanford Encyclopedia of Philosophy (2021); Daniel Markovits, Contract Law and Legal Methods (2012); *but see* Melvin A. Eisenberg, Foundational Principles of Contract Law (2018); Richard Craswell, *Contract Law: General Theories*, *in* Encyclopedia of Law & Economics (2012).

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If it were simply a question of a critical review of private law—conventionally defined with all the reservations mentioned above—or of the "culture"—changing, complex, variously contaminated—of private law, one could indeed replace this formula with that of the pluralistic perspective suggested by the authors.

However, this might appear too hasty, because in fact for some decades North American doctrine has organized this "theory" around private law, the contours of which are, moreover, very nebulous.

The meaning of "legal theory" is so firmly established as corroborated by the studies of legal philosophers, legal analysts, epistemologists, and so on. While the meaning of "private law theory" is as undefined as it appears, which does not mean, in the intentions of the exponents of this line, simply "general theory of private law."

An unsurpassable example of the classical conception of "legal theory" is the manual by Wolfgang Friedmann,[41] today unjustly neglected. Friedmann, combining his own extraordinary culture of civilian and scholar of international law, as well as a philosopher of law, with the culture of the expert common lawyer, acquired following his expatriation to the United States for racial reasons condensed into a few hundred pages a historical excursus of extraordinary clarity.[42]

Preceded by reflections on justice—in particular the justice of the ancients, from Homeric to Platonic to Aristotelian—his discourse is based on aspects of connection between law, justice, ethics and "social morality," on the relationship between the sciences and law, on the antinomies that mark the general theory of law—the individual and the universe, voluntarism and objective knowledge, intellect and intuition, stability and change, positivism and idealism, collectivism and idealism, democracy and autocracy, nationalism and internationalism—and then the main theories of law, natural law, Hegelian idealism, Kant's neocriticism, the philosophy of values, sociology, phenomenology and existentialism, the influence of biology and social phenomena on law, and concluding with an analysis of positivism, the jurisprudence of interests, the new idealism, and the problems of justice. Friedmann devotes much space to private law in the concluding chapters of his book, both by discussing the freedoms that mark its content—freedom of contract, freedom of association and employment, freedom of possession and enjoyment of property, freedom of private initiative and personal freedoms—but also by examining some of the problems that are most dear to us today, i.e., the approach to the institutions of private law as seen in the English, North American and continental systems.

A notion of "legal theory" closer to that advocated by Grundmann, Micklitz, and Renner is used by Richard Posner in *Frontiers of Legal Theory*.[43] In this analysis Posner turns not so much to jurisprudence or legal reasoning, but to the external analysis of law to understand how law helps lawyers to solve problems: Sciences such as economics, sociology, psychology become a point of reference together with history. Posner does not forget the influence that German thought has had on American legal culture: Savigny on Holmes, Weber on Roscoe Pound, and psychology on realists such as Llewellyn, Frank and Douglas. Also the "feminist jurisprudence" of Ruth Bader Ginsburg and Catherine McKinnon contributed to the foundation of a new way of conceiving law, no longer centered on the male, but on gender diversity, on social roles, on the contrast between the sexes in the world of work. Posner deals with behavioralism, constitutional interpretation, critical and postmodern legal studies, and the role of the courts in the administration of justice and the creation of law.

Quite different are the contributions collected under the shield of "Private Law Theory" per se.

First of all, it is not clear when it emerged and became a point of reference for the doctrine. In 2005, Peter Cane, one of the most brilliant scholars of civil liability, an exponent of Australian

[41]Legal Theory (3rd ed., 1967).

[42]Jurists Uprooted: German-Speaking Emigré Lawyers in Twentieth Century Britain (Jack Beatson & Reinhard Zimmermann eds., 2004).

[43]Richard Posner, Frontiers of Legal Theory 1 (2001).

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culture halfway between English common law and North American common law, published an essay in response to a request from the editor of the Oxford Journal of Legal Studies to take stock of the "private law theory" of the last twenty-five years. Its origins, provided that they should not be anticipated, should be placed around the 1980s, when the first contributions of American doctrine appeared which, provoked by Rawls' essay on justice, began to reflect on the problem of whether the rules of private law could be used to achieve the objectives of distributive justice. These essays, by different authors and with different training, focus mainly on the economic analysis of law, and on the classical institutions of private law: Property, contract and tort.[44] But the twenty-five year limit is not connected with the first statements of this theory, being rather linked to the year of the launch of the journal that promoted the debate.

In fact, Cane discusses three different methodological orientations that we could assign to the politics of law: The conception that sees private law as an instrument of social policy—instrumentalist theory—, the conception that sees private law as a set of rules functional to the realization of aims other than those of private individuals (functionalist theory), and the theory that sees private law only as a role in the resolution of conflicts between private individuals—formalist theory.[45] The first two conceptions of private law are promoted by the current of critical legal studies[46] and feminist studies. With the exception of the third conception, which could be considered the most traditional and conservative, the others expound an idea of law that cannot be separated from politics.

This is the thesis of the book edited by D. Kairys[47] in which, in an accurate analysis of the formation of law in capitalist societies, especially in the USA, it covers both the institutions of private law—property, torts, contract, corporation, labor—and the correlated aspects of public law that directly affect the legal situation of the individual—liberty, equality, health and environmental law, social welfare—to re-examine the theory of the distribution of powers, precisely to demonstrate that private law, and even less the institutions of private law, cannot be isolated from the regulatory context and from the "system" considered in its entirety.

In the eyes of the Italian jurist, these perspectives are also well known, and, so to speak, by now customary, at least since the publication in Italy, starting in the 1970s, of a number of journals dedicated precisely to the critical study of law, such as *Politica del Diritto, Democrazia e Diritto, Rivista Critica del Diritto Privato*, *Quale Giustizia*—later to become *Questa Giustizia*—, *Critica del Diritto*, and so on. These journals have become heart of the discipline.

Intertwined with these conceptions are the various streams of economic analysis of law, in particular the concept of normative economics, which goes back to Richard Posner and the Chicago School, and the concept of Law & Economics of Guido Calabresi, of the Yale School.

Then there are the problems linked to the conception of justice: Distributive, corrective, commutative. Here the divisions between the most representative authors of private law theory are clear. Those who do not tolerate "intrusions" of the legal system into the sphere of relations between private individuals,[48] exclude that there is room for distributive justice. Distributive justice has the aim, as John Finnis maintains[49] of sharing profits and disadvantages, roles and commitments, resources and opportunities between the parties, and support the "autonomy" of private law. But this position is opposed by all those who see in the rules of law a relational system in which the interests of the parties are compared and composed, taking into account their status, their bargaining power, and the social aims they wish to achieve. This opposition now presents itself under the species of the neorealists and the neo-conceptualists, the former being

[44]Peter Cane, *The Anatomy of Private Law Theory: A 25th Anniversary Essay*, 25 Oxford J. Legal Stud. 203 (2005).

[45]Weinrib, *supra* note 28.

[46]Cane, *supra* note 44, at n. 18, n. 19

[47]David Kairys, The Politics of Law (1980).

[48]*E.g.*, Weinrib, *supra* note 28.

[49]John Finnis, Natural Law and Natural Rights (1980).

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oriented towards confining the aims of private law within the limits of corrective justice, the latter open instead to the application of social aims and thus to the distribution of burdens, obligations, duties and rights and other positions of advantage among private individuals.[50]

The most recent, well-informed and comprehensive essay on "Private Law Theory" has been written by Steve Hedley, professor at University College Cork, and also founder of a website devoted to private law theory.[51] In these pages, Hedley discusses the studies that have appeared in recent years, as well as the book under review. He examines their methodological aspects and their effect on legal research. But also the ideological assumptions, which are those underlying the great currents of thought such as legal realism, positivism, with the variant of formalism, theories of justice and so on.[52]

D. A Pluralistic Letter of Private Law

This long introduction should guide us to understand not only the title, but also the aims and contents of the book we are examining. The novelty lies in the fact that, unlike those who study private law with unitary methods, the authors propose a pluralistic letter of it, adopting different methods and each time choosing, depending on the problem to be solved, the most appropriate one.

It is precisely this holistic vocation of the research that should explain why it concerns only private law and not the whole of law with all its branches, but I believe that the answer lies in the intention of the Authors to engage in dialogue with the exponents of that philosophical trend, thus entering directly into *medias res*.

The starting point, which we cannot but agree with, is the theory of pre-comprehension, by Gadamer and Esser, long studied, translated, and discussed also in Italy. Here, rather than jurisprudential references, perhaps it would be interesting to take up the considerations that jurists such as Tarello, Guastini, and Parodi make on the distinction between "provision" and "norm," and therefore the different operations and manipulations that the interpreter brings to the normative text. Certainly, appreciable is the reference, in the chapter dedicated to the relationship between—private—law and sociology, to the works of Marx, Durkheim, Weber, Polanyi, because in the English or North American experience of Private Law Theory its protagonists blatantly ignore the contributions of continental European scholars, and the great Masters of Western culture mentioned above.

Equally interesting is the chapter on the economic analysis of law. Here the reconstruction of theoretical profiles focuses on the origins of this approach, in particular on Coase's "problem of social cost," and on its developments, with particular regard to the contributions of Williamson and Arrow. Certainly, this is the aspect most frequently addressed by the authors of Private Law Theory, who correctly distinguish between economic analysis of law and Law & Economy according to the teaching of Guido Calabresi. However, it is clear that, even if represented in a more circumscribed way, the authors' proposal is that this direction cannot be considered as all-encompassing and "normative," as it must be combined with the other social aspects.

It is interesting to note how this direction has been affirmed in Europe, first of all in Italy since the 1960s, both with Pietro Trimarchi's research and with the translation of Guido Calabresi's essays, edited by Stefano Rodotà. It has appeared more recently in England, as well as in France. In Germany, the manual by Schaefer and Ott—which has been translated into Italian—presents a particular feature, absent from other continental experiences, namely the study of the economic aspects of domestic law, while, as happens with all the contributions of philosophers

[50]Hanoch Dagan & Benjamin C. Zipursky, *Introduction: The Distinction Between Private Law and Public Law* 20, *in* Research Handbook of Private Law Theory (Hanoch Dagan & Benjamin C. Zipursky eds., 2020).

[51]Steve Hedley, *Private Law Theory: The State of the Art* (2021), https://ssrn.com/abstract=3917777.

[52]Steve Hedley, *The Rise and Fall of Private Law Theory*, 134 L. Q. Rev. 214 (2018).

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of law, the authors of Private Law Theory refer, so to speak, naturally to the experience they know best, namely the American experience.

The analysis of the communicative theory of Habermas and Luhmann, an aspect also usually neglected by English and North American authors, could not be missing.

Comparative law and historical analysis have already been mentioned. In this regard, it may be useful to mention the contributions in English by our leading figures in comparative law, from Gorla to Sacco, and, as regards historical studies, the works translated into English by Paolo Grossi and Antonio Padoa-Schioppa.

E. Remaining Topics in *New Private Law Theory*

Having prepared the methodological framework, the authors of the book under review deal with areas more familiar to continental scholars, such as the constitutionalization of private law—part two; economic transactions and risks, i.e. market discipline—part three; in which they appropriately reconstruct the origins of the ordo-liberal economy; persons and organization—part four; and private law beyond the state—part five.

However, they do not deal with bio-law and the application of information technology and artificial intelligence to relations between private individuals: Two areas of particular importance in today's world, the first, linked as it is to the very concept of the dignity of the person, to life and its rules, to the essential dilemmas of man in our post-modern society; the second, being linked to the development of the market, the exploitation of personal data, and the digitalization of the person. We must not forget that the European model, which is more guaranteeing than that of the United States, did not seem to be reconcilable with the needs of American companies, and therefore the negotiations between the European Union and the United States for the creation of the Transatlantic Trade and Investment Market (TTIP) could not be concluded.

The last two parts are perhaps the most original, although in this mighty reconstruction of the cultural foundations of private law each section brings originality and novelty, at least compared to the more recurrent analyses that gather under the heading of Private Law Theory, and deserve special attention.

The authors have—necessarily—made a selection of the topics to be dealt with, because the subject matter is almost endless, but the reader, fascinated by the reading of the pages that evoke in such a stimulating way the cultural humus of private law, would like to find in this very book the treatment of some of the problems that agitate today's discussions in academic and professional forums.

In many pages of the book one finds quotations from the general clauses and references to the fundamental "values" of private law. Now, one of the most complicated aspects relates precisely to the role that values can play in the interpretation of laws and the resolution of cases: It is not just a question of the limits to the freedom of the interpreter, but more generally of the legitimation of values as such in the discourse of jurists. Talking about values does not necessarily imply a priori agreement with the philosophy of values, nor does it imply abdication of control over the interpreter's discretion. And yet they are referred to by the legislature itself; their binding nature does not derive from an inductive hermeneutic process but directly from the legislative text itself: Shining examples of the legitimacy of recourse to values are to be found in the texts of the Treaties of the European Union and in the Preamble to the Charter of Fundamental Rights. Articles Six and Seven of the EU Treaty state that the European Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities, as laid down in Article Two of the Treaty on European Union (TEU). And the preamble to the Charter states that the Union, "conscious of its spiritual and moral heritage" is founded "on the indivisible and universal values of

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human dignity, freedom, equality and solidarity" and is based on the principle of democracy and the rule of law.

Well, we cannot think that the "theory" of private law can ignore these premises: In other words, private law, however it may be conceived and however it may be delimited, cannot exist without the recognition of these values. Otherwise, there is a risk of proposing an incomplete or even anti-historical representation. Incomplete, because private law cannot be reduced to private patrimonial law, so that the idea that private law is confused with the institutions of private law, and in particular is reduced to considering only property, contract and liability, is absolutely reductive and must be rejected. It is anti-historical, because the idea of a private law linked to the free market is typical of the nineteenth century, but cracks in the second half of the twentieth century, and becomes unfeasible from the third millennium onwards.

Still talking about values and principles, one of the most extensive and engaging debates in literature, both European and otherwise, concerns the relationship between principles and rules. Principles have been taken seriously, and thus Ronald Dworkin's fears have been dispelled. But rather little thought has been given to the emergence of principles.

The world of principles is older than the world of values: As we know, it was already rooted in Greek philosophy, and then penetrated into legal discourse with the *regulae iuris.* The case law of the Court of Justice and of the European Convention on Human Rights—which is expressly referred to in the Preamble to the Charter—shows that this technique is one of the tools used by the jurist—legislator, judge, scholar—to outline the characteristics of a system and thus the "face" of private law in its historical and geographical location.

It is precisely the immanence of principles in the hermeneutic method that implies a reconnaissance of the sources of private law.

This opens up another theme, which the authors do not address directly, but which crops up at times in the various chapters of the book.

And the question that the reader asks himself, a question that affects the entire conception of Private Law Theory, is whether it is possible to reconstruct a "theory" of private law erased from the legal system in which it is supposed to be embedded.

It is clear that the authors of the common law world do not see this as an essential problem connected with their approach, because in that world the circulation of ideas is closely linked to conceptions of institutes and phenomenal realities that are homologous to each other. But Wolfgang Friedmann, and then all the scholars of comparative law over the last century, have already warned that the circulation of models, the transplantation of institutions, and the affinities of legal reasoning cannot lead to a homologation of legal systems. Quite apart from the problem of "competition between legal systems," the creation of a common core or even a unified text of rules—as the Study Group for a European Civil Code has proposed to do with the Draft Common Frame of Reference—is subject to all the difficulties dictated by the contingent situations existing in the national legal systems.

It is precisely the consideration of certain institutes of private law that demonstrates the impossibility of constructing an ideal private law or, in any case, a "theory" of private law that is extraneous and superior to, or detached from, a legal system in force in a given place at a given historical moment. This does not mean that there can be nothing beyond positive law, but it does mean that when discussing matters of positive law it is impossible to ignore it.

For example, it is understandable that there is a circularity of themes and questions in common law regarding the "essence" of the contract: The common lawyer can portray the contract as a "promise," and thus underline its moral value, or as a "deal," and thus underline its instrumental function in the market; but can a civilian speak of a contract without presupposing the definition of *Vertrag* of German law, *contrat* of French law, or *contratto* of Italian law? The same can be said of property, of "common goods," of copyright—both patrimonial and moral. The discussion on torts is simpler, because, beyond the peculiarity of the rules of the codes and case law, the problems relating to the distribution of risk, compensation for damage, prevention of damage and its

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sanction have a less relevant historical background, a more concrete immediacy in reality and an easier "exportability." The debate on damage caused by robots or driverless cars is a universal chorus of voices that can be coordinated without any particular problems.[53]

F. On the Conclusion of *New Private Law Theory*

The three authors attempt to answer these questions in the concluding chapters of the book: Hans-W. Micklitz discusses "law as product," multilevel governance and "Economic Constitution," Moritz Renner dealing with Transnational Law and Private Ordering, and Stefan Grundmann taking up the initial propositions on the immanence of social aspects in the discourse of law.

What has been said so far suggests their thinking in this regard.

Each of these arguments, however, requires an in-depth examination that is beyond the scope of these brief notes, which were intended more simply to point out the importance of this work and the fallacies of the "theory of private law." For this reason, I would like to continue to consider this extraordinary research as an attempt—from the perspective proposed here certainly successful—to demonstrate, if ever it were still necessary, that one cannot speak of law, or rather, more drastically, one cannot conceive of law, without immersing it in social reality.

The great difference between the conceptions of private law, and therefore between the different theories of private law, today lies in the influence of constitutional law and European law—understood both as the law of the European Union and as national law of European origin—which is found in the countries of the European Union. The North American conception of private law obviously disregards, or rather opposes, European law; The English conception recovers the public aspects from the point of view of fundamental rights, and after Brexit one can imagine that the influence of European law will diminish in any case.

For us, European citizens, therefore, today's private law can only be governed by the Ordo-liberal conception of the market and the future of private law can only pass through the future of the European Union.

This does not imply an uncritical acceptance of private law as it is, nor does it prevent us from asking ourselves how it should be: The very analyses proposed by the three Authors help us to understand how that private law was formed and the ideological substratum that has sustained its transformations. In order to better understand these transformations—I insist—we must refer to the Drittwirkung of constitutional values in relations between private individuals and to the values of the European Union.

What we have to ask ourselves, also on the basis of the "canon" of theoretical foundations identified by our Authors at the basis of the new private law, is whether the economic-social system established in the European Union can be further supplemented by the application of the Charter of Nice, which appears about ten years after the Single Act and the Treaty of Maastrict, which are the pillars with which the ordo-liberal model is strengthened. And whether social rights, which are indivisible from fundamental rights, can be realized more fully than they have been so far. In other words, the description of the system that has contributed to shaping the new private law should not lead us to believe that it is a system to be accepted in toto and that it is not possible to correct it in its more liberal forms and therefore less attentive to the needs of the marginal fringes of society. In other words, we have to ask ourselves whether the European model codified today responds exactly to the principles of inclusion and solidarity.

[53] Guido Calabresi & Enrico Al Mureden, Driveless Cars (2021).

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